

Attachment 6

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

U S West Communications, Inc.
Section 271 Compliance
Investigation

Case No.
PU-314-97-193

TRANSCRIPT OF
SPECIAL MEETING

Taken At
State Capitol
Bismarck, North Dakota
June 6, 2002

EMINETH & ASSOCIATES
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1 (The proceedings herein were had and made
2 of record, commencing at 9:05 a.m., Thursday, June
3 6, 2002, as follows:)

4 COMMISSIONER WEFALD: Good morning. It's
5 9 a.m. It's June the 6th, 2002. The Commission is
6 meeting for a special meeting in the Commission
7 hearing room, 12th Floor of the State Capitol
8 Building. We have just a few items on our agenda.
9 There's no consent agenda today, and the portfolio
10 items are under Commissioner Clark's portfolio.

11 But before we do that, are there any
12 welcoming comments from the other commissioners?

13 COMMISSIONER REINBOLD: Just welcome.
14 Nice to be living in Bismarck with a "c."

15 COMMISSIONER WEFALD: All right. And
16 then we've got Commissioner Clark, and I'm
17 Commissioner Susan Wefald and Commissioner Leo
18 Reinbold is here today.

19 COMMISSIONER CLARK: Yes. Welcome. We'll
20 start. We've only got three motions to make.
21 First, I'll move that the Commission deny AT&T's
22 motion to reopen proceedings in U S West
23 Communications, Inc.'s Section 271 Compliance
24 Investigation, Case No. PU-314-97-193, and that
25 further investigation -- further investigation or

1 proceedings, if any, relating to the issues raised
2 by AT&T in its motion be held in a separate docket
3 under the provisions of 47 USC Sections 251 and 252
4 and in accordance with future direction from the
5 FCC.

6 COMMISSIONER WEFALD: Second.

7 COMMISSIONER REINBOLD: Second.

8 COMMISSIONER CLARK: What this motion
9 deals with is a proposed motion that AT&T submitted
10 to the Commission, and what they were asking us to
11 do is reopen the public interest portion of this
12 proceeding that we've been having and to focus in
13 on the question of the alleged secret
14 interconnection agreements, which some folks may be
15 aware of was highlighted most probably prominently
16 in Minnesota recently, and it has to do with what
17 interconnection agreements have to be filed with
18 the Commission under Section 251 and 252 of the
19 Federal Act.

20 In any case, AT&T was asking that we
21 reopen that here in North Dakota and hold that
22 investigation as part of our 271 hearing into
23 public interest, but I have moved and am
24 recommending that we deny that for three basic
25 reasons.

1 First of all, there is a request pending
2 at the FCC from Qwest to make a declaratory ruling
3 on where exactly the line is as far as what
4 interconnection agreements need to be filed and
5 what interconnection -- well, what other types of
6 agreements don't need to be filed.

7 And the FCC will do basically one of two
8 things. They could say, no, this isn't something
9 that we're going to decide on. This is really a
10 state issue that's going to be decided by state
11 commissions individually and they could punt the
12 issue back to us, which could happen. Or they
13 could say we're going to come out and set the
14 guidelines under the Federal Act and give you state
15 commissions guidance upon what is an agreement that
16 has to be filed under 251 and 252 and what
17 doesn't. In either case, that's pending at the
18 FCC, and for us to make a decision on that right
19 now would be ill-timed.

20 Secondly, even if the FCC kicks this back
21 to us and even if they kick it back, let's say,
22 with some guidelines about what should be filed and
23 what shouldn't, we still have recourse available in
24 North Dakota under those same sections in 251 and
25 252 to do all the investigation that we need to

1 do. And so to handle it as part of this proceeding
2 is, I think, probably inappropriate and awkward.

3 And, finally, you know, this issue is
4 before the FCC. Qwest's application I assume
5 within the next few weeks is going to be before the
6 FCC. The FCC knows about both of these things, has
7 them both on their radar screen, and if they're
8 very concerned about the impact of this
9 interconnection agreement issue with the 271 issue,
10 then they'll certainly have that on their radar
11 screens and if they have great concern about it,
12 they'll be able to deal with it in due course, as
13 well.

14 So for those reasons I'm recommending that
15 we deny the motion and not make any prejudgment
16 upon the validity of these alleged secret
17 interconnection agreements, and if it comes to the
18 point where we need to hold separate hearings and
19 investigations on that, we can do it at that time.

20 COMMISSIONER WEFALD: I agree. I think
21 this is a serious issue that merited consideration
22 by the Commission. However, I also agree that
23 there is a place for us to investigate this, if
24 necessary, under Section 251 and 252, and so I do
25 not believe that it is necessary for us to reopen

1 the public interest section of 271 at this
2 particular time. But I will be very interested in
3 following what the FCC does on this particular
4 matter and the guidance it gives to the states and
5 then having a chance to meet with my fellow
6 commissioners about what action to take, if
7 necessary, at that time.

8 COMMISSIONER REINBOLD: This motion will
9 still give anyone that needs enough wiggle room to
10 carry on their activity and come before the
11 Commission.

12 MR. MIELKE: All in favor?

13 COMMISSIONER WEFALD: Aye.

14 COMMISSIONER REINBOLD: Aye.

15 COMMISSIONER CLARK: Aye.

16 The second motion, I move the Commission
17 adopt the Interim Consultative Report on Public
18 Interest in U S West Communications, Inc.'s Section
19 271 Compliance Investigation, Case No.
20 PU-314-97-193.

21 COMMISSIONER REINBOLD: Second.

22 COMMISSIONER CLARK: This is the
23 aforementioned public interest portion of the
24 proceeding that we have been holding. There are a
25 number of issues that are addressed in here. I'll

1 just highlight a few.

2 There was some discussion in the public
3 interest portion of our hearing about UNE prices,
4 wholesale prices, rates, things like that. We down
5 the line agreed with the facilitator's
6 recommendations, and we have noted that in a number
7 of these cost-type questions while the record that
8 was built didn't specify any overwhelming reason to
9 not recommend that Qwest get 271 approval, we have
10 noted that on those specific cost issues we do have
11 a cost docket that's open and we'll be dealing with
12 those issues at a later time, and that on such rate
13 issues as access, the state has made significant
14 progress towards taking care of the access issue.

15 There was some questions raised and a good
16 deal of the hearing dealt with the level of
17 competition. There have been intervenors who have
18 argued that there needs to be a certain level of
19 actual competition in the marketplace before a
20 state would recommend that a Bell company be
21 allowed into the long distance market.

22 The FCC has rejected that notion because
23 they have pointed out that there could be a number
24 of reasons why there's not a certain level of
25 competition in the marketplace at a given time.

1 For example, a Bell company may have done
2 absolutely everything that they need to do to open
3 up their network to make it perfectly available to
4 competitors, but because perhaps capital markets on
5 Wall Street haven't been conducted conducive to
6 competitors getting the capital that they need to
7 get into the marketplace, that that may be the
8 reason. There could be a number of other reasons
9 that competitors aren't getting in that have
10 nothing to do with the Bell company's standard of
11 practice. And so that has been dismissed by the
12 FCC.

13 We do note, however, that in North Dakota
14 relative to other states in the Qwest region we
15 have found a relatively very high level of
16 competition compared to other states. In fact,
17 there was some testimony that North Dakota among
18 the Qwest states has the highest level of
19 competition as far as number of percentagewise
20 competitors that are in the marketplace. We had
21 some testimony that competitors have about a 20
22 percent penetration rate into the local phone
23 market and that Qwest still retains about 80
24 percent of those former lines, which compared with
25 other states in the region is very favorable. And

1 so that was a good deal of it.

2 Then we also have incorporated some
3 language in addressing the -- some of the Qwest
4 prior conduct issues that we dealt with in our
5 previous motion and outlined the testimony that we
6 had regarding AT&T's request to reopen the
7 hearing.

8 COMMISSIONER WEFALD: When I took a look
9 at this section called public interest, I guess I
10 expected some different kinds of issues than what
11 are included in it, and yet many of the same kinds
12 of things that have been dealt with in other parts
13 of the 271 are included under public interest,
14 things like unbundled element prices, calculation
15 of current wholesale rates, pricing of unbundled
16 network elements and cost methodology. These are
17 not things that make the average consumer out there
18 sit up and take notice, but these are public
19 interest issues in that they relate to competitors
20 in the wholesale market, and so that's what the
21 whole focus of this 271 is on and they're very
22 important to those folks.

23 So it is a different slant. This whole
24 case is a little bit different in that we're
25 dealing with the wholesale market on these issues.

1 They're still very important because ultimately the
2 decisions that we make in this case will make an
3 impact on how much competition there is in the
4 State of North Dakota going forward in the future.
5 And that is important for North Dakotans to have
6 choice in their local telephone service.

7 COMMISSIONER REINBOLD: An awful lot of
8 work coming to a point with this motion.

9 MR. MIELKE: All in favor?

10 COMMISSIONER WEFALD: Aye.

11 COMMISSIONER REINBOLD: Aye.

12 COMMISSIONER CLARK: Aye.

13 The third motion is really a two-part
14 motion. I move the Commission acknowledge that U S
15 West Communications, Inc. (now known as Qwest
16 Corporation) has incorporated in its Statement of
17 Generally Accepted Terms and Conditions and its
18 Performance Assurance Plan the changes recommended
19 by the Commission in its interim reports for Case
20 No. PU-314-97-193.

21 And I move the Commission acknowledge
22 that, to date, all known issues regarding Section
23 271 Compliance Investigation have been addressed by
24 the --

25 COMMISSIONER WEFALD: By the Commission.

11

1 COMMISSIONER CLARK: -- by the
2 Commission. This is an old one, too. There we
3 go. And I move the Commission acknowledge that, to
4 date, all known issues regarding the Section 271
5 Compliance Investigation, with the exception of
6 issues regarding testing of Qwest's Operational
7 Support Systems that will be addressed by the
8 Commission in the near future, have been addressed
9 by the Commission in its draft Cumulative Report
10 that will be filed with the Federal Communications
11 Commission upon completion. All cost issues have
12 been deferred to the cost investigation in Case No.
13 PU-2342-01-296.

14 COMMISSIONER REINBOLD: Second.

15 COMMISSIONER WEFALD: Second.

16 COMMISSIONER CLARK: Basically what this
17 says is, summed up, two things. The first is that
18 we're acknowledging that all the things that we had
19 requested in previous orders, changes that Qwest
20 made to its Statement of Generally Available Terms
21 and to the Performance Assurance Plan, that all the
22 things that we requested be changed, we've looked
23 through and they have been changed so we're saying
24 that's been done.

25 And then the second thing is an

12

1 acknowledgment that all of these issues that have
2 been outstanding, all the deferred issues that we
3 have put off have all been addressed by the
4 Commission, they're closed, and the only thing
5 that's still open that we need to look at is the
6 operational support system, which we're going to
7 take up, we have a work session on it on Monday,
8 and we'll be addressing that. But this is just
9 sort of a motion that gives formally a sense of
10 where the Commission is at as far as its progress,
11 which is that we're very far along and really all
12 we have to do after this is to tie the pieces
13 together of all these orders that we have out and
14 put the OSS piece in and put out a final report.

15 COMMISSIONER WEFALD: This was a very
16 important part of this process to have our staff go
17 through and to check that all of the
18 recommendations that had been made throughout this
19 process have been incorporated in the Statement of
20 Generally Available Terms and Conditions. The
21 Statement of Generally Available Terms and
22 Conditions, if I brought it in here, is a pile of
23 paper about this high. It's the basic agreement
24 that is going to be available to any competing
25 local exchange carrier, and they're going to have

1 an opportunity to adopt this in full.

2 And so it's so important that the language
3 that the Commission has been discussing for the
4 last year and a half and making recommendations on
5 has been put into place in this SGAT by Qwest. So
6 our staff went through that very carefully and then
7 they also looked to be sure that the conditions
8 that had been put into the Performance Assurance
9 Plan was also put in place by Qwest. So it took
10 quite a bit of staff time to make sure that all of
11 these things have been incorporated in the plan,
12 but that's all been done and that's recognized with
13 this order.

14 And as Commissioner Clark said, we're
15 wrapping up the work that needs to be done on this
16 because we're anticipating that Qwest is going to
17 be filing its application on either the 13th or the
18 14th with the FCC, and then after that point the
19 Commission has 20 days to get its recommendation
20 into the FCC on this whole matter. So that's why
21 we're having a number of special meetings at the
22 present time.

23 As you've noted, though, from even
24 discussions today at this meeting, there's going to
25 be a number of proceedings that still the

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1 Commission is going to need to address, and that
2 is, multitenant environment is one that we've said
3 will need to be addressed after we finish even the
4 work with this 271 project, the cost case, which is
5 going to be very important to wholesalers and to
6 the people of North Dakota with their telephone
7 costs, and then if -- depending on what the FCC
8 says and what we find out from other states, the
9 251 case involving Qwest's conduct, so the
10 Commission does still have some work to take care
11 of.

12 COMMISSIONER REINBOLD: This is an
13 opportunity for Qwest to move to a higher level of
14 service and activity if they can do it.

15 MR. MIELKE: All in favor?

16 COMMISSIONER REINBOLD: Aye.

17 COMMISSIONER WEFALD: Aye.

18 COMMISSIONER CLARK: Aye.

19 And that completes the motions.

20 (Concluded at or about 9:15 a.m., the same
21 day.)

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1 CERTIFICATE OF COURT REPORTER

2
3 I, Denise M. Andahl, a Registered
4 Professional Reporter,

5 DO HEREBY CERTIFY that I recorded in
6 shorthand the foregoing proceedings had and made of
7 record at the time and place hereinbefore
8 indicated.

9 I DO HEREBY FURTHER CERTIFY that the
10 foregoing typewritten pages contain an accurate
11 transcript of my shorthand notes then and there
12 taken.

13 Bismarck, North Dakota, this 6th day of
14 June, 2002.

15
16 
17 _____
18 Denise M. Andahl
19 Registered Professional Reporter
20
21
22
23
24
25

Attachment 7

where it implicates Section 271. Even the Iowa Utilities Board, which investigated these agreements in a separate docket and concluded that they should have been filed, 118/ still rejected AT&T's call to re-open Qwest's Section 271 application. The Board held that because its order in the unfiled agreements docket (Docket No. FCU-02-2) put Qwest on notice that future failures to file would result in penalties, the matter was resolved going forward, which is all that Section 271 requires. 119/

Qwest looks forward to the Commission's decision on its pending Petition. Meanwhile, however, it has taken broader action to eliminate any issue going forward. First, as detailed in the declaration of Mr. Larry Brotherson, while Qwest's petition is pending the company has voluntarily committed to file with the states all future contracts, agreements, and letters of understanding negotiated with CLECs that create obligations in connection with Sections 251(b) or (c). Brotherson Reply Decl. at ¶ 8. Qwest believes that this "all obligations" standard is overbroad, and that Section 252(a) does not require filing and prior PUC review and approval of any and all obligations agreed to between an ILEC and a CLEC. For example, regulatory approval should not be required for carrier-specific implementation details related to provisioning, Qwest-CLEC relationship management issues (such as meeting schedules and

(June 12, 2002); Transcript of Special Meeting, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, North Dakota Public Service Comm'n, Case No. PU-314-97-193 (June 6, 2002); accord, Order on AT&T Motion to Reopen Proceedings, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming's Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Wyoming Public Service Comm'n, Docket No. 70000-TA-00-599 (June 18, 2002).

118/ See Order Making Tentative Findings, Giving Notice For Purpose of Civil Penalties, and Granting Opportunity to Request Hearing, *In re AT&T Corporation v. Qwest Corporation*, Iowa Utilities Board, Docket No. FCU-02-2 (May 29, 2002).

119/ See Iowa Order to Consider Unfiled Agreements at 9-10.

Attachment 8

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE)
APPLICATION OF QWEST)
CORPORATION REGARDING RELIEF)
UNDER SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS)
ACT OF 1996, WYOMING'S)
PARTICIPATION IN A MULTI-STATE)
SECTION 271 PROCESS, AND)
APPROVAL OF ITS STATEMENT OF)
GENERALLY AVAILABLE TERMS)

Docket No. 70000-TA-00-599
(Record No. 5924)

ORDER ON AT&T MOTION TO REOPEN PROCEEDINGS

(Issued June 18, 2002)

This matter is now before the Wyoming Public Service Commission (Commission) upon [i] AT&T Communications of the Mountain States, Inc.'s (AT&T) Motion to Reopen Proceedings (the AT&T Motion); [ii] the Opposition thereto by Qwest Corporation (the Qwest Opposition); and the Reply of AT&T to the Qwest Opposition (the AT&T Reply). The Commission, having reviewed the pleadings in the above-captioned case and its files concerning the matter, having heard the oral arguments of parties to this case thereon, having reviewed applicable Wyoming and other telecommunications utility law, and being otherwise fully advised in the premises, HEREBY FINDS and CONCLUDES:

1. On May 14, 2002, AT&T filed the AT&T Motion, seeking therein to reopen, or, as alternatively argued to have the Commission keep open, its proceedings in the above-captioned case to take further evidence on what it termed "secret deals" -- contracts between Qwest Corporation (Qwest) and other competitive local exchange carriers alleged to have been wrongfully withheld from state regulatory commissions. In its Motion, AT&T described a complaint before the Minnesota Public Utilities Commission which alleged that Qwest failed to file eleven agreements between it and various competitive local exchange carriers. The complaint alleged a violation of the federal Telecommunications Act of 1996 because the agreements constituted interconnection agreements which should have been filed by Qwest for formal public approval by the Minnesota Public Utilities Commission. AT&T urged us to reopen proceedings in Wyoming to take further evidence on these agreements because, AT&T argued, Qwest's actions violate federal law, they show an inability or unwillingness to provide interconnection to competitive local exchange carriers on a nondiscriminatory basis, and they, in effect, bought the silence of critics in the Qwest's 271 compliance proceedings. The AT&T Motion did not point to any specific acts or agreements of concern in Wyoming but urged further proceedings to discover any harm accruing in Wyoming. AT&T's Motion asserted that Qwest had a duty under federal law to file the agreements and seek our approval for them.

2. On May 30, 2002, AT&T filed the AT&T Reply, arguing that AT&T would enter the Wyoming market when feasible, that a standard defining agreements which should be filed exists, and that the Commission should apply a standard, even if a uniform federal standard does not exist. AT&T urged the Commission to hold an investigation and to do so in the above-captioned proceeding rather than separately to develop evidence on agreements which "may have hindered or otherwise affected" the above-captioned proceeding.

3. In its Opposition, filed with the Commission on May 24, 2002, Qwest argued that the AT&T Motion constituted a delaying tactic with respect to the above-referenced proceeding. The Qwest Opposition noted that no standard for what constitutes an interconnection agreement which must be filed has been established, although it has filed and sought approval of "hundreds" of interconnection agreements pursuant to Section 252 of the federal Act. Qwest also showed that it has formally sought clarification of this issue from the Federal Communications Commission, which agreed so provide that clarification. See, Qwest's April 23, 2002, Petition for declaratory ruling on the scope of the duty to file and obtain prior approval of negotiated contractual arrangements under Section 252(a)(1), FCC WC Docket 02-89. The comment cycle ends June 13, 2002, and the FCC will thereafter render a decision. AT&T has participated in this FCC proceeding and has filed comments. Noting that AT&T's argument relied heavily on allegations concerning Qwest's dealings with Eschelon, Qwest noted that this company did not provide any services in Wyoming. Further, Qwest committed in writing to the Commission that it would voluntarily file and seek approval for "all contracts, agreements and letters of understanding with CLECs that create forward-looking obligations to meet the requirements of sections 251(b) or (c) . . ." of the federal Telecommunications Act of 1996. (See, May 10, 2002, letter of R. Steven Davis of Qwest to the Commission attached to the Qwest Opposition.) It is creating a management committee to ensure compliance. Qwest also, and very importantly, discussed the fact that the agreements and their impact on the independent third-party testing of Qwest's Operational Support Systems, which was conducted under the auspices of the 13-state Qwest Regional Oversight Committee (the ROC OSS test), was reviewed and analyzed by the KPMG consulting firm. According to Qwest, this KPMG review, as of May 9, 2002, showed that there was a lack of evidence that the agreements had affected the ROC OSS test.

4. Pursuant to due notice, the AT&T Motion, the AT&T Reply and the Qwest Opposition were heard at the Commission's regular open meeting of June 6, 2002, with Qwest, AT&T, Contact Communications, the Consumer Advocate Staff, InTTec and Visionary Communications (the Visionary Group) appearing through counsel and providing arguments.

5. AT&T clarified that it wanted the above-captioned proceedings left open to provide for discovery, an investigation and a formal review of the potential impact of any agreements on Wyoming. AT&T argued that an investigation would amount to an assertion of Wyoming's "state's rights" to define which agreements must be filed and investigated. AT&T admitted, however, that there was no general standard definition

of such agreements. It learned from and discussed with the Commission staff the KPMG report that found no effect from the agreements on the ROC OSS testing. AT&T also discussed investigatory proceedings going forward in other states, notably in Iowa and Minnesota, acknowledging that they were separate from the relevant Section 271 proceedings in those states.

6. Qwest responded, noting that another case has already been docketed before the Commission and urged further consideration to take place in that proceeding. Complaint processes and court action were also available as remedies if any harm were found. In the meantime, Qwest would adopt a broad filing standard in Wyoming and await the definitive ruling which it has sought from the FCC and which would establish a national standard for such filings. It noted that AT&T had filed similar motions in nine states in which Qwest provides local exchange service and that the four states which had considered it as of June 6, 2002 (Colorado, Montana, Nebraska and North Dakota) had denied it.

7 The Visionary Group argued in favor of investigating the agreements in this proceeding. Counsel stated that such an investigation would allow it to bring up questions of retail contractual services, averring also that Qwest has sold products to a competitor but would not sell them to the Visionary Group. Counsel thought a hearing was necessary for understanding the Wyoming-specific issues in this case.

8 Contact Communications urged the Commission not to make a decision until pending motions by TouchAmerica, not currently a party to this case, were considered by the Commission. Counsel suggested that allowing "pick and choose" incorporation of provisions from interconnection agreements reached anywhere in the nation would help to alleviate the problem.

9. The Consumer Advocate Staff argued that the issue of what constitutes an interconnection agreement that must be filed for approval by the Commission was properly before the Federal Communications Commission. It took no formal position on the AT&T Motion but noted that an alternative forum exists for hearing and review of the situation.

10. The issue of what constitutes an interconnection agreement which must be filed for approval is properly before the Federal Communications Commission. It makes no sense to us to craft a local standard which might require the filing of an agreement in Wyoming while the same document could be kept secret in an adjoining state. There are many instances in which local expertise and concerns require us to undertake Wyoming solutions to Wyoming problems; but this is not such a case. We have received no evidence that any wrongdoing is taking place in Wyoming regarding any "secret" interconnection agreements; and, the KPMG report of its analysis of the impact of the agreements on the ROC OSS testing process -- a place where such problems would be likely to manifest themselves -- shows no impact. Moreover, our specifically docketed proceeding to consider the subject (Dockets No. 70017-TC-02-26 and 70000-TC-02-773), instituted at the urging of AT&T, is the right proceeding in

which to consider further action on the issue. Several of the issues brought up by AT&T, Contact Communications and the Visionary Group are Wyoming-specific. They have been argued in the state-specific hearing in this matter and will be dealt with in our deliberations on these Wyoming issues. In the meantime, the commitment of Qwest to file all of the broad category of agreements described above provides a way to examine them and see their impact on Wyoming in an open forum. Each agreement will be noticed and subject to public comment before being considered for approval by the Commission under the federal Telecommunications Act of 1996.

11. We conclude that good cause has been shown in the public interest why the AT&T Motion should be denied. We will remain receptive, however, to any showing of actual harm to Wyoming consumers arising from an interconnection agreement and will work to remedy any such harm.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:


1. The AT&T Motion is denied
2. This order is effective immediately.

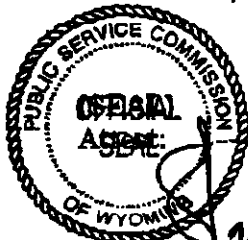
MADE and ENTERED at Cheyenne, Wyoming, on June 18, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING


STEVE ELLENBECKER, Chairman


STEVE FURTNEY, Deputy Chair


KRISTIN H. LEE, Commissioner




STEPHEN G. OXLEY, Secretary and Chief Counsel

Attachment 9

DATED AUG 19 2002

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 823

In the Matter of the Investigation into the)
Entry of QWEST CORPORATION, formerly)
known as U S WEST COMMUNICATIONS,) **FINAL RECOMMENDATION**
INC., into In-Region InterLATA Services) **REPORT OF THE COMMISSION**
under Section 271 of the Telecommunications)
Act of 1996.)

DISPOSITION: AFFIRMATIVE RECOMMENDATION

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**APPENDIX A: SUBSTANTIVE REPORTS OF THE ADMINISTRATIVE LAW
JUDGE AND THE COMMISSION**

- Workshop 1 Findings and Recommendation Report of the Administrative Law Judge (ALJ), Dated October 17, 2000, Pages 1 - 20.
- Workshop 1 Findings and recommendation Report of the Commission, Dated April 16, 2001, Pages 21 - 45.
- Workshop 1 Findings and Recommendation Report Clarification and Ruling of The Commission, Dated August 7, 2001, Pages 46 - 51.
- Workshop 2 Findings and Recommendation Report of The ALJ, Dated July 3, 2001, Pages 52 - 88.
- Workshop 2 Findings and Recommendation Report of The Commission, Dated October 22, 2001, Pages 89 - 116.
- Workshop 3 Findings and Recommendation Report of The ALJ and Procedural Ruling, Dated November 2, 2001, Pages 117 - 151.
- Workshop 3 Findings and Recommendation Report of The Commission, Dated December 21, 2001, Pages 152 - 169.
- Workshop 4, Part 1, Findings and Recommendation Report of The Commission and Procedural Ruling, Dated February 5, 2002, Pages 170 - 217.
- Workshop 4, Part 2, Findings and Recommendation Report of The Commission and Procedural Ruling, Dated June 3, 2002, Pages 218 - 316.

APPENDIX B: Revised SGAT Sections 9.23.3.7.2.1, 9.23.3.7.2.2 and 9.23.3.7.2.3

APPENDIX C: Revised SGAT Exhibit K Sections 13.5, 13.6 and 13.7

INTRODUCTION

The Telecommunications Act of 1996 ("the Act"), Section 271(d)(2)(B) provides, in pertinent part, as follows:

"(B) Consultation with state commissions.—Before making any determination under this subsection, the [Federal Communications Commission (FCC)] shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."¹

The purpose of this proceeding, generally, has been to examine the representations, behavior and performance of Qwest Corporation (Qwest) and to decide whether or not to recommend to the FCC that it be granted the authority to provide in-region interLATA Services. The Commission has based its recommendation upon its findings as to whether Qwest has met the competitive checklist² and other requirements of the Act which prescribe the mechanism by which Qwest may be found eligible to provide such in-region interLATA services.

Procedures Utilized by the Commission. In order to be able to make such findings, the Commission established procedures by Order No. 00-243, (May 5, 2000) and Order No. 00-385, (July 17, 2000), for the conduct of a series of "workshops" which, taken together, would cover all relevant matters. Rather than review the checklist items and other criteria in the sequence in which they occur in the Act, the issues were grouped according to practical considerations and by mutual agreement as follows:

Workshop 1:

Checklist Item 3: Access to Poles, Ducts, Conduits and Rights-of-Way
Checklist Item 7: 911, Directory Assistance and Operator Services
Checklist Item 8: White Pages Listings
Checklist Item 9: Numbering Administration
Checklist Item 10: Signaling and Call-Related Databases
Checklist Item 12: Local Dialing Parity
Checklist Item 13: Reciprocal Compensation

¹ Section (d)(2)(A) of the Act requires that the FCC also consult with the Attorney General of the United States. In response, "the [United States] Attorney General shall provide to the [FCC] an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight the Attorney General's evaluation...." The standard that the U. S. Department of Justice has utilized is whether "the local markets in a state have been 'fully and irreversibly' open to competition." Under that standard, the U. S. Department of Justice recommended that Qwest be granted in-region long distance authority in Colorado, Idaho, Iowa, Nebraska and North Dakota. *Evaluation of the United States Department of Justice, WC Docket No. 02-148, July 23, 2002, pp. 1-2.*

² The items on the Competitive Checklist are set forth in fourteen subsections of Section 271(c)(2)(B) of the Act.

Workshop 2:

Checklist Item 1: Interconnection and Collocation
Checklist Item 11: Local Number Portability
Checklist Item 14: Resale

Workshop 3:

Checklist Item 2: Access to Unbundled Network Elements
Checklist Item 5: Access to Unbundled Local Transport
Checklist Item 6: Access to Unbundled Local Switching

Workshop 4 (Parts 1 and 2):

Checklist Item 4: Access to Unbundled Loops
"Emerging Services": Subloop Unbundling, Dark Fiber, Packet Switching and Line Sharing
SGAT³ General Terms and Conditions
Public Interest Requirements of Section 271 (d)(3)(C)
Section 272 Separation and Safeguard Requirements
Section 271(d)(3)(C) Post-entry performance monitoring and enforcement (Qwest Performance Assurance Plan or "QPAP").

Workshop 5:

Checklist Item 2: Operations Support Systems (OSS)
Compliance with Commission Recommendations in Workshops 1-4
Substantial Changes or Errors in Law or Fact

The review methodology evolved somewhat over the course of the workshops. At first, the process called for the issuance of Recommendation Reports from presiding Administrative Law Judge Allan J. Arlow (the ALJ) to the Commission.⁴ Each of the first three ALJ Recommendation Reports was followed by a round of Comments by the parties, culminating in the issuance of a Recommendation Report by the Commission. For the reasons mentioned in our Workshop 4, Part 1, Recommendation Report and Procedural Ruling, the Commission eliminated the intermediate ALJ Recommendation Report phase and, beginning with the Workshop 4, Part 1, Recommendation Report, the Commission began to directly issue Findings and Recommendation Reports based upon the record and the briefs submitted by the parties at the close of the workshop. We followed the same process with the Workshop 4, Part 2, Recommendation Report. By agreement of the parties, the final phase of the proceeding, "Workshop 5," was conducted solely via the submission and review of written testimony and briefs.

³ Statement of Generally Available Terms. The access and interconnection offer agreement required by Section 271(c)(2)(A) and Section 252(f).

⁴ Copies of Commission and ALJ Recommendation Reports with respect to each of the issues addressed in the Workshops are contained in Appendix A to this Report and periodically referred to herein.

Scope of the Final Report. This Final Report adopts and includes each of the recommendations of the prior Workshop Recommendation Reports, except as modified by this Final Report itself. In preparation for the issuance of this Final Report, the Workshop 4, Part 2, Recommendation Report established a procedural schedule under which parties to the proceeding would file pleadings and supporting testimony. By agreement of the parties, the procedures were modified so that Qwest would submit all of its direct case materials by June 14, 2002; Intervenor⁵s would file materials in reply by June 28, 2002; Qwest and Intervenor⁵s would be permitted to file materials in rebuttal on or before July 12, 2002. The revised procedures were adopted by a Ruling of the ALJ on June 17, 2002. These modifications slightly altered the structure of the Final Report.

In addition to the adopted Workshop Recommendation Reports, the Final Report contains several components leading up to our final recommendations. First, it provides our findings and conclusions with respect to Qwest's performance in the independent testing of the Operations Support Systems (OSS).

The second additional aspect of the Final Report (reviewed under the general heading of "SGAT Compliance") resolves matters examined in previous workshops where we failed to make affirmative recommendations with respect to Qwest's actions or representations for one or more of the following reasons:

- (1) Qwest had failed to meet its burden under the requirements of the Act;
- (2) Our decision was deferred to later workshops where related issues were to be explored;
- (3) We were of the opinion that deferral of a decision would permit parties to reach a compromise position or clarify areas where potential misunderstandings might exist;
- (4) We had directed Qwest to make specific changes either to the SGAT or other relevant documents; and/or
- (5) We had made approval of certain provisions contingent upon satisfactory performance in related OSS testing.

This section also examines the following issues with respect to the SGAT and its attachments, including the QPAP:

- (1) Changes in federal or Oregon law since the time that the Commission's recommendation was issued, having a material impact on any of our recommendations;

⁵ In the case of Intervenor⁵s, such submissions would be with respect to other Intervenor⁵s' filings. None, however, were filed.

(2) Newly-discovered facts having a material impact on any of our recommendations;

(3) Commission error with respect to its interpretations of law having a material impact on any of our recommendations.

Finally, under the heading "Public Interest and Qwest Secret Contracts," we consider issues raised by intervenors with respect to Qwest's behavior.

Standards of Review and Burden of Proof. As noted in our previous reports, the FCC has ruled that Qwest has the burden to demonstrate that it has "fully implemented the competitive checklist and, particularly, that it is offering interconnection and access to network elements on a nondiscriminatory basis," and that the standard of proof upon Qwest to meet that burden is by a preponderance of the evidence.⁶ Once Qwest had made a *prima facie* case, it fell upon the intervenors to "produce evidence and arguments to show that the application does not satisfy the requirements of Section 271, or risk a ruling in the Bell Operating Company's (BOC's) favor."⁷

With respect to functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the standard is that it must provide access to its competitors "in substantially the same time and manner as it provides to itself." Where there is an analogous retail situation, "a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers or affiliates, in terms of quality, accuracy, and timeliness." In those instances where a retail analogue is lacking, the BOC "must demonstrate that the access it provides to competing carriers would offer an efficient carrier a meaningful opportunity to compete."⁸

Regional Uniformity as an Aid to Competition. During the course of this proceeding, we have been impressed with the need for cooperative effort on the part of regulators in the oversight of incumbent carriers and with the advantages of a consistent operating environment as an aid to encouraging a competitive marketplace. It is far harder for a new market entrant to negotiate and manage a region-wide agreement with an incumbent carrier so that it can provide services over a wide geographic area, if the contractual provisions vary in numerous minor details by jurisdiction. Similarly, it is more difficult to measure Qwest's performance across the region, if different performance criteria must be met in each state.

We thus modify our Workshop 4 Part 2, Report to impose an additional criterion on our decision-making process: where a provision or policy, with which we have previously disagreed, has been adopted by a substantial majority of the states in the Qwest

⁶ *Bell Atlantic New York Order*, (FCC 99-404) at par. 48.

⁷ *Id.* at par. 49.

⁸ *Id.* at par. 44 *et seq.*

region, we will maintain our previous provision or policy only where we find that such deviation from the majority view will substantially improve competition within Oregon.

FINDINGS AND RECOMMENDATIONS

I. Operations Support Systems (OSS)

Background. Operational Support Systems are the systems Qwest will utilize in communicating with, and providing services to, its competitors. Access to fair, efficient and nondiscriminatory operation of those systems is considered critical to the existence of competition in the local exchange market.⁹ Public utility commissions from all of the states within the fourteen-state Qwest region, except Arizona, worked cooperatively among themselves and, subsequently, with several independent business organizations they had retained, to conduct extensive testing of the operations support systems and undertake a thorough and impartial analysis of those results.

The tests included analyses of the following:

- (1) Pre-ordering, Ordering and Provisioning Functional Evaluation
- (2) Order Flow-Through Evaluation
- (3) Pre-ordering, Ordering and Provisioning Volume Performance Test
- (4) Maintenance and Repair (M&R) Functionality and End-to-End Trouble Report Processing Tests, including M&R Volume Test
- (5) Billing, Usage and Carrier Bill Functionality Test
- (6) Competitive Local Exchange Carrier (CLEC) Support Processes and Procedures Review
- (7) Change Management Test
- (8) Performance Measure Audit

The lead organization in this effort was KPMG Consulting (KPMG), which developed a Master Test Plan, and, in conjunction with Qwest, CLECs, representatives of state commissions and several other organizations, conducted the "military style" test and analyzed the results.¹⁰

On May 28, 2002, KPMG issued its Final Report (KPMG Report). As we noted in the Workshop 4, Part 2, Recommendation Report, "With respect to the OSS testing report, the burden shall be on the party who differs with the report's findings with

⁹ The "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" required by checklist item 2 has been determined by the FCC to include OSS. *Local Competition First Report and Order*, 11 FCC Red at 15766 (1523).

¹⁰ Essentially, Qwest's performance was measured against the Performance Indicator Definitions (PIDs). When tabulated results within the test reports showed that Qwest had failed one or more of the PIDs, Qwest would make modifications to its systems operations and retake the tests. This process continued until Qwest had achieved satisfactory performance with respect to the PID in question. The KPMG Report is already on file with the Federal Communications Commission and therefore no purpose is served to describe it in great detail here.

respect to a particular issue or with the report as a whole." Qwest's Verified Comments Regarding the ROC Final OSS Test Report, Exhibit 600, (Qwest-OSS Comments) were filed on June 17, 2002 and accompanied by Exhibits 602-666. Qwest contends that the KPMG Report supports a finding that Qwest has satisfied the requirements of Section 271 of the Act with respect to the OSS aspect of Checklist Item 2.¹¹

During the intervening period since the issuance of our Workshop 4, Part 2, Report, public utility commissions in other jurisdictions, most recently the state of Washington, have found that Qwest has, in general, demonstrated OSS performance at a level sufficient to justify a positive recommendation to the FCC with respect to that aspect of Qwest's 271 application.

There is little in the overall OSS process that is Oregon-specific and nothing which rises to such magnitude as to justify findings substantially different from those made elsewhere in the Qwest region.¹² Thus, rather than parse the results of tests which have already been exhaustively analyzed by experts and adopted by commissions in neighboring states, we accept their findings and recommend to the FCC a finding of compliance by Qwest with respect to this aspect of its Section 271 application.

II. SGAT Compliance

As an integral part of its Workshop 5 filing, Qwest submitted an SGAT which constituted its "last best offer" (the LBO SGAT). Qwest asks the Commission to accept its language as satisfactorily responsive to the issues which had not previously been resolved in Qwest's favor. We note that, over the course of this proceeding, Qwest filed numerous revised versions of its SGAT document. Most of the revisions which we recommended in order for Qwest to obtain our affirmative recommendation on its 271 application, were made, without fanfare, during the course of submitting the revised SGATs which preceded the LBO SGAT. We accept, without further review, Qwest's representations that such changes have been appropriately made, except in the two instances discussed below where CLECs jointly interposed objection to Qwest's resolution of two issues, UNEC-2 and Loop 23. In Section II of its Opening Filing, Qwest addressed in detail seven specific issues which it had not previously revised.¹³ We discuss each below in the order in which it was considered in our Workshop Recommendation Reports.

¹¹ Qwest OSS Comments, p. 2.

¹² See, e.g. Comments of AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on Behalf of TCO Oregon on the ROC OSS Final Report. (AT&T OSS Comments). AT&T asserts that the KPMG methodology was flawed with respect to pre-ordering, ordering, provisioning and billing and, where it was not flawed, found Qwest's performance to be deficient in the areas of (1) providing jeopardy notices, (2) providing unbundled dark fiber, (3) providing enhanced extended links (EELs), (4) providing UNE-P and resale services for installations not requiring dispatch services and (5) maintenance and repair services.

¹³ Changes made in order to comply with our Workshop 4, Part 1, and Workshop 4, Part 2, Reports are itemized in Qwest's Opening Filing, footnotes 3-5. Other changes were adopted as a result of consensus settlements in other jurisdictions and miscellaneous technical changes. *Id.*, footnotes 7-8.

Workshop 1: Issues 3-2.1 and 3-4.

Issue 3-2.1. In our Workshop 1 Findings and Recommendation Report of the Commission, issued April 16, 2001, at pp. 7-8, we adopted the recommendation of the ALJ, who found that "[a]lthough CLECs are not entitled to automatically "piggyback" on private ROW (Rights-of-way) and MDU (multiple dwelling unit) agreements, they must be afforded reasonable access to those documents. Nondiscriminatory access to this information in Qwest's possession will help to enable a CLEC to negotiate on a reasonably equal footing with Qwest." We further stated that Qwest should negotiate the language with the CLECs "so that it will not be necessary to dictate the terms which the Commission will require...."

The parties did not settle on mutually satisfactory language with respect to this requirement. We therefore must prescribe the language to be included in the SGAT which adequately addresses our findings. Qwest proposes new language in LBO SGAT section 10.8.2.27, which, it asserts, has been adopted in the Utah and Washington SGATs.¹⁴ No CLEC interposed an objection to the proposed language. We approve the new language and adopt LBO SGAT Section 10.8.2.27 as responsive to our earlier findings and conclude that Qwest has satisfied this checklist item requirement.

Issue 3-4. This issue, addressed in SGAT Exhibit D, section 2.2, concerned CLEC placement of large orders for access to poles, ducts, conduits and rights-of-way and the time in which Qwest had to respond to those orders. Qwest had argued that the 45-day time limit applied to a particular pole or manhole, rather than a large order. It made an offer to resolve the issue with numerical limits, but the Commission did not issue a finding on its proposed language. Rather, we acknowledged the practical difficulties inherent in filling large orders in tight timeframes and urged the parties to negotiate further.¹⁵

The Qwest LBO SGAT seeks to resolve this issue without setting rigid numerical standards. The revised language in Section 2.2 of Exhibit D, permits Qwest to seek a waiver of the 45-day interval from the Commission in the event of an unusually large or difficult request. Thus it believes that it "acts" within 45 days by providing access to a subset of the request, rather than waiting to provide access to all simultaneously, while the waiver request is pending. This, it believes, is consistent with previously decided cases. Qwest also notes that the proposed Exhibit D, Section 2.2 language was adopted by Idaho, Iowa, Nebraska, New Mexico, Utah, and Wyoming on the recommendation of the Multistate Facilitator.¹⁶ No CLEC has commented on this proposed draft language solution. We find the new language to be a reasonable resolution of the issue and conclude that Qwest has satisfied this checklist item issue.

¹⁴Qwest Corporation's Cover Pleading for Workshop 5 Opening Filing, (Qwest Opening Filing), pp. 8-9.

¹⁵ Workshop 1 Report, pp. 10-11.

¹⁶ Qwest Opening Filing, p. 10.

Workshop 3: Issue UNEC-2

According to AT&T, UNEC-2 and Loop 23 "are the only additional two issues with regard to which Qwest's proposed language does not appear to be compliant with this Commission's orders."¹⁷

Issue UNEC-2. Qwest did not object to the ALJ's findings in Workshop 3, wherein he concluded that

"Qwest is not in compliance with Checklist Item 2 on this issue until such time as the SGAT language is modified to clearly reflect the limited nature of the commingling prohibition and the permissive connection of UNE combinations with Finished Services other than special access."¹⁸

The CLECs jointly assert that LBO SGAT Sections 9.23.3.7.2.1, 9.23.3.7.2.2 and 9.23.3.7.2.3 do not comply with the ALJ's ruling, because the phrase "Qwest Tariffed and Private Line Services" rather than "Qwest Special Access Services" (which the CLECs propose) has been utilized.¹⁹

In reply, Qwest asserts that it has incorporated "virtually verbatim language used by the FCC in its *Supplemental Order Clarification*. This language continues the settled prohibition against connecting EELs with special access services....[however,] in the interest of closing this issue Qwest is willing to modify the Oregon SGAT language in these section to match that used in the Colorado (and Washington) SGAT attached as Exhibit 1."²⁰ The revised language deletes references to "price lists" and "private line" services and refers instead to "Qwest Tariffed services." Qwest contends that "[w]hen read in conjunction with the surrounding sections, particularly section 9.23.1.2.2, this language satisfies the Joint CLECs' concerns and fully comports with the Commission's ruling."²¹ That section states, in part, "UNE Combinations may be directly connected to Finished Services, except for tariffed special access services that are expressly prohibited by Existing Rules."

In light of the foregoing, we accept Qwest's proposed modification to the LBO SGAT and find Qwest in compliance with Section 271 with respect to this issue. The modified language is affixed to this Report as Appendix B.

¹⁷ Joint CLEC Comments Regarding Qwest's SGAT Compliance Filing (Joint SGAT Comments), p. 3. As noted above, Qwest has indicated seven areas requiring our review.

¹⁸ ALJ Workshop 3 Recommendation Report, p. 22.

¹⁹ Joint SGAT Comments, p. 4.

²⁰ Qwest Corporations Reply to Joint CLEC Comments Regarding Qwest's SGAT Compliance Filing (Qwest SGAT Reply), p. 5. (FCC *Supplemental Order Clarification* case citation in fn. 2 omitted).

²¹ *Id.*

Workshop 4, Part 1: Issues Loop 23, NID 2, SB-1 and SB-2

Issue Loop 23. This issue concerns loop plant administration and deployment practices that are designed to result in spectrum compatibility, i.e., preventing interference between services and technologies that use pairs in the same cable. We found the issue could best be resolved by requiring the inclusion of specific, additional language in SGAT Section 9.2.6.²² The CLECs assert that a side-by-side examination of our Report and the LBO SGAT shows that Qwest failed to insert the language ordered by the Commission and weakens Qwest's obligations and CLECs' rights with regard to spectral interference with CLEC services.²³

Qwest responds by noting that the Washington Utilities Transportation Commission (WUTC), in its 28th and 34th Supplemental Orders, accepted the revised Qwest language now contained in Section 9.2.6.4 because it "recognize[d] that there may be instances where the latest T1 technology may create interference.... We are also concerned that there may be instances where remote DSL may contribute to an interference problem. For these reasons, we accept Qwest's proposed rewording...."²⁴

We consider the differences between our proposed solution and the language which Qwest has included in the LBO SGAT to be minor; the sections are substantially similar in effect and practical operation. We therefore accept Qwest's version in the interests of regional uniformity and find that Section 9.2.6 of the LBO SGAT complies with the requirements of Section 271 with respect to this issue.

Issue NID 2. This issue deals with the question of whether Qwest should be required to make space available on a network interface device (NID) and whether CLECs should have the right to remove or "cap off" unused Qwest lines. AT&T proposed language, adopted by the Washington ALJ, which we found to be "sufficiently narrow to address Qwest's legitimate safety concerns and, at the same time, furthers the FCC's intention to make access to the NID available in any technically feasible manner." We then ordered Qwest to revise Section 9.5.2.1 accordingly.²⁵

Qwest adopted new language in the LBO SGAT, but not exactly as we had provided. Qwest cited changed circumstances, specifically the June 11, 2002, WUTC's 28th Supplemental Order revision which, at AT&T's request, also added new language to SGAT Section 9.5.2.5.²⁶ The effect of the change was to allow the CLEC to remove the Qwest facilities if the spare Qwest loops are terminated on protection devices that protect Qwest and its customers from electrical surges. The new language also clearly provides

²² The language is set forth in the Workshop 4, Part 1, Report at page 20.

²³ Joint SGAT Comments, pp. 4-5.

²⁴ Qwest SGAT Reply Comments, p. 6 citing WUTC's 28th Supplemental Order at 14, ¶46.

²⁵ "9.5.2.1: At no time should either Party remove the other Party's loop facilities from the other party's NID without appropriately capping off the other party's loop facilities." Workshop 4, Part 1, Report, p. 31.

²⁶ Qwest Opening Filing, p. 12.

for CLEC liability for damages in the event that safety standards are not observed.²⁷ Qwest's response in Washington state was to seek further modification of its Washington SGAT by asking that the CLEC be required to notify Qwest in writing whenever it disconnected Qwest facilities from a NID protection device. The purpose of such change was to "allow Qwest to maintain proper records of its facilities." Qwest disagreed with the overall net result of the revisions, but included them in the SGAT for the sake of uniformity.²⁸

The CLECs note Qwest's noncompliance with our original directive on this subject and assert that we should therefore summarily reject Qwest's LBO SGAT language or, in the alternative, review their prior briefs and the appended the June 10, 2002, Affidavit of Kenneth L. Wilson on behalf of AT&T in the Minnesota 271 Proceeding with respect to Emerging Services.²⁹ However, the Joint SGAT Comments provide no particular reference or citation to the Wilson Affidavit, and it does not appear to address this issue—the after-the-fact reporting of disconnection of facilities. Instead, it focuses on matters which are discussed *infra* under Issue SB-2. In essence, the relevant portions of the Wilson affidavit argue against the requirement for CLECs *obtaining permission in advance* before gaining certain types of NID access. Thus the CLECs have made no argument against the change.

The new Section 9.5.2.5 does not require such advance permission; rather, it requires notification within ten days, via e-mail that Qwest facilities have been disconnected. This requirement is neither burdensome nor discriminatory. The Qwest language, which was adopted by the WUTC and inserted in the LBO SGAT, is approved and found to comply with the requirements of Section 271 of the Act with respect to this issue.

Issue SB-1. This issue relates to the time intervals in which Qwest must respond to CLEC requests for access to Qwest-owned, multi-tenant inside wire. While noting that "[b]oth the Multistate Facilitator and Washington ALJ wrestled with this issue at length" we had originally concurred with the Washington ALJ in reducing the intervals in Sections 9.3.3.5 and 9.3.5.4.1 of the SGAT from five and ten days, respectively, to two days.³⁰ Qwest notes that the WUTC revised the ALJ's decision because "the CLECs and Qwest had reached consensus regarding these intervals, and thus the intervals recommended in...the Washington ALJ's Report were no longer necessary." Qwest provides a narrative of the proceedings with respect to this issue in the state of Washington and concludes by noting that it has included the revised language in the LBO SGAT.³¹

²⁷ *Id.*

²⁸ *Id.*, p. 13, citing WUTC 31st Supplemental Order at ¶31.

²⁹ Joint SGAT Comments, pp. 2-3 and attachment.

³⁰ Workshop 4, Part 1 Report, pp. 32-33.

³¹ Qwest Opening Filing, pp. 14-16.

In response, the CLECs again refer to the Wilson Affidavit, but do not indicate where the issue is discussed. A review of the affidavit does not find a discussion of the issue readily apparent.

We find the changes offered by Qwest, to be reasonable, especially in light of the representation by Qwest that CLECs are in agreement—a representation that the Joint SGAT Comments do not refute. We accept the language contained in the LBO SGAT as satisfying the requirements of Section 271 of the Act with respect to this issue.

Issue SB-2. This issue considers the question of whether a CLEC must submit a local service request ("LSR") to order subloops. We previously found that "on balance, the LSR process is too costly and time consuming a process to impose upon CLECs who wish to gain access to subloops which include the inside wire of an MTE or MDU."³²

Qwest has asked us to modify our recommendation, citing the WUTC's reversal on this issue and giving their reasons. First, Qwest indicated that, since 70-80 percent of inside wire orders require number portability, only 20 or 30 percent of subloops would fall within the exemption. Second, it noted that ten other states within the region require LSRs for all orders. Finally, Qwest argues that, when internal tracking procedures are not used, it becomes difficult to manage CLEC customers who are returning to Qwest. The WUTC also reversed "in the interest of uniformity."³³

The Wilson Affidavit asserts that a CLEC should not be required to submit an LSR "before utilizing the on-premises wiring [because it] is a discriminatory practice not permitted by the Act....[I]t creates a materially more burdensome means of access than Qwest affords itself."³⁴ Further, Mr. Wilson says that "Qwest has explicitly stated in recent Oregon workshops that 'inventory does not need to be completed before the CLEC gains access to the subloop element.' Thus, the *immediate* need for Qwest to have an inventory *through the LSR process* is no longer a concern for Qwest."³⁵

While we note the burden which the LSR process creates for those 20-30 percent of subloop orders, we also acknowledge the value of uniformity across the region and thus accept the revised language contained in Sections 9.3.5.1.1, 9.3.5.2.1 and 9.3.5.4.4 of the LBO SGAT. We find Qwest to be in compliance with Section 271 of the Act with respect to this issue.

³² Workshop 4, Part 1, Report, p. 34.

³³ Qwest Opening Filing, p. 17 and citations thereof.

³⁴ Wilson Affidavit, p. 12.

³⁵ *Id.*, p. 15. (Emphasis supplied).

Workshop 4, Part 2: General Terms and Conditions and Qwest Performance Assurance Plan (QPAP)

Limitations on Liability. In our Report, we required Qwest to remove the cap on damages which could be paid to a single party as not being standard industry practice; the cap had been set at the amounts charged during a contract year.³⁶ Qwest argues that the cap should be reinstated and cites both the reversal of the Washington ALJ by the WUTC and the Multistate Facilitator's recommendations carving out exceptions to the limits on Qwest's liability.³⁷ Together, Qwest argues, these represent standard industry practices. Qwest also notes the similarities of its provisions and those approved as part of the SBC Texas 271 application.³⁸ The Joint SGAT Comments do not address these revisions. We thus revise our ruling and find that the language in LBO SGAT Section 5.8.1 satisfies the requirements of the Act.

Six Month Plan Review Change Control Limitations. Section 16 of the QPAP addresses the review of the performance measurements to determine whether any changes should be made. The Multistate Facilitator examined the means by which Commissions could review and identify changes in measures and then ask to have them included in an amended SGAT filing. The Facilitator found the arbitration provisions in the Texas plan to be an appropriate means to assure that the QPAP meets applicable standards, while at the same time avoiding undue financial exposure for Qwest. He then proposed several changes to the QPAP to effectuate those changes. After a review of the analysis performed by the Multistate Facilitator, we concluded that the changes "are not only useful in and of themselves, but will provide for ease of administration by Qwest and CLECs across the region."³⁹

Several CLECs argue that our conclusions are in error because "[t]his Commission-approved language leaves almost all control over the QPAP with Qwest....By allowing Qwest to use the existing language, including its 'Voluntariness of Proposal' section, the Commission has run afoul of FCC precedent as confirmed by the rulings of other Commissions in the territory in which Qwest operates. In fact, the Oregon Commission is the only Commission to allow this language in the QPAP to stand."⁴⁰

Qwest's response has several components. First, it claims that the Joint QPAP Comments are misleading because, when referring to other jurisdictions, they do not quote from the actual language of any approved QPAP, which, Qwest claims, neither removes from nor grants authority to the state commission. It also notes that five other

³⁶ Workshop 4, Part 2, Report, p. 22.

³⁷ Qwest Opening Filing, p. 18.

³⁸ *Id.*, p. 19.

³⁹ Workshop 4, Part 2, Report, pp. 79-80, citing Multistate QPAP Report, pp. 60-61. (Emphasis supplied).

⁴⁰ Joint CLEC Comments Regarding Qwest's Performance Assurance Plan (Joint QPAP Comments) filed by AT&T Communications of the Pacific Northwest, Inc., and AT&T Local services on behalf of TCG Oregon and Worldcom, Inc., p.3-4, (emphasis in text). However, see *Id.*, En. 6.

state QPAP's six-month review provisions are "nearly identical to provisions in [the Oregon QPAP].... Given that the QPAP's six month review provision is nearly identical to provisions in five other PAPs approved by the FCC, the QPAP's provision clearly satisfies the FCC's zone of reasonableness standard, and the Commission's approval of that provision cannot constitute legal error."⁴¹ Qwest also notes that the PAP is a *quid pro quo* for interLATA market entry and, therefore, Qwest can rescind the QPAP in the event it exits the interLATA market.⁴²

In reviewing this issue, we find that we have not committed legal error in our conclusions and affirm our earlier findings with respect to this issue.

Liquidated Damages: Preclusion of Additional Remedies. In our Report, we noted with approval the following comment of the Multistate Facilitator:

"What we need to do ultimately is to preserve the ability to allow CLEC recovery for those additional forms of recovery, whatever the action brought to secure them. At the same time, we need to make sure that from any such recovery there is deducted in one way or another the contract damages amount, for which the QPAP should provide."

We further concurred with his proposed solution for modifying the QPAP, as necessary, to accomplish these goals and his rejection of AT&T's arguments that the provision gave Qwest an unreviewable determination of offsets.⁴³ Qwest responded accordingly by the inclusion of QPAP Section 13.6 in Exhibit K to the LBO SGAT.

The CLECs argue that the Commission is in error because the Multistate Facilitator was wrong and the proposed language was contrary to law. They claim that every state, save Idaho and Utah, rejected the Multistate Facilitator's language. They further argue that "[t]he payments arising out of Tier I plan are relatively small and would not even begin to compensate CLECs fully for the harm that Qwest's poor performance could cause. The question is not one of double recovery.... [I]t goes beyond avoiding double recovery and prevents CLECs from seeking full compensation for any contractual or other claims they may have against Qwest."⁴⁴ The CLECs further note that Oregon was the only state that accepted the principle of offsets with respect to court judgments, even though courts may consider whether an award would lead to double recovery.⁴⁵

While Qwest asserts that "there is no basis for modifying the determination of the Commission to ensure that the QPAP is not used as simply a floor

⁴¹ Qwest Corporation's Reply to CLEC Comments Regarding the QPAP (Qwest QPAP Reply), p. 14.

⁴² *Id.*, p. 15.

⁴³ Workshop 4, Part 2, Report, pp. 67-68.

⁴⁴ Joint QPAP Comments, p. 13.

⁴⁵ Joint QPAP Comments, pp. 21-23.

for obtaining additional payments for the same or analogous wholesale performance...in an effort to expedite a resolution of this matter, Qwest would have no objection to an alternative set of provisions that deal with liquidated damages and offset in a manner already agreed to by AT&T [in North Dakota]....Qwest offers them as a way of eliminating any dispute on this question."⁴⁶

We encourage both settlement of issues and uniformity of result to ease the administration of interconnection agreements for ILEC and CLEC alike. Consequently, we hereby adopt the Qwest-proffered language, affixed hereto as Appendix C and find Qwest in compliance with Section 271 of the Act, with respect to these issues.

Special Access Performance Reporting. In Workshop 4, Part 2, we were asked to consider the request for additional QPAP measures and payments for the provision of special access. We reviewed the applicable FCC orders and found that the FCC specifically rejected arguments that the provision of special access services is relevant either to Section 271 or our Public Interest analysis and declined to require additional measurements. Even though we expressed our sympathy to CLEC concerns, we noted that such matters were always intentionally reviewed by state commissions in proceedings which were separate and apart from the consideration of Section 271 compliance.⁴⁷

Time Warner Telecom of Oregon, LLC (T/W) takes exception to our ruling. Essentially, T/W argues that the cited orders are not dispositive; they only state that special access is not a checklist item, but do not reach "the question of whether special access performance can or should be considered as part of a performance assurance plan under the much broader public interest standard." T/W then cites actions by commissions in Colorado, Washington Utah and Minnesota incorporating special access performance reporting into the QPAP. T/W urges the Commission to act in a similar manner in accordance "with its long history of pro-competitive decisions," especially since a number of competitors have pulled out of Oregon or have reduced their presence.⁴⁸

T/W acknowledges that our consideration of special access in a 271 proceeding is, at most, discretionary. In the Qwest region, 97 percent of special access services are purchased from the other side of the jurisdictional fence—under interstate tariffs. It is for the FCC to deal with Qwest performance in that area. As Qwest notes, "the entire purpose of the QPAP is to ensure against 'backsliding' from ...checklist compliance after section 271 approval has been granted."⁴⁹ Furthermore to the extent that

⁴⁶ Qwest QPAP Reply, pp. 7-8.

⁴⁷ Workshop 4, Part 2, Report, p. 73 and fn's 261 and 262.

⁴⁸ Workshop V Statement of Exceptions of Time Warner Telecom of Oregon, LLC Regarding Commission Positive Recommendations, p. 2-4.

⁴⁹ Qwest QPAP Reply, p. 18.

substantial local exchange service is involved, the special access circuits may be converted to functionally equivalent UNEs already covered by the QPAP.

We affirm our earlier recommendation and find Qwest to be in compliance with Section 271 of the Act with respect to the exclusion of special access measurements from the QPAP.

Restrictions on Use of Tier 2 QPAP Payments. This issue relates to the funding of the QPAP Audit Plan and whether Oregon law precludes the use of Tier 2 QPAP payments for that purpose. The applicable statute, ORS 759.445(1) provides, in pertinent part, as follows:

"(1) There is established in the State Treasury, separate and distinct from the General Fund, the Connecting Oregon Communities Fund. Moneys in the fund shall consist of amounts deposited in the fund under ORS 759.405 and any other moneys deposited by a telecommunications carrier that elects to be subject to ORS 759.405 and 759.410, including amounts deposited pursuant to a performance assurance plan implemented by the telecommunications carrier in connection with an application under 47 U.S.C. 271 as in effect on January 1, 2002."

In our Report, we stated

"With respect to the audit funding process, the [Multistate] Facilitator recommended that '[p]ayment of audit program costs constitutes a sound use of Tier 2 payments. Qwest should fund in advance the costs of the first two-year cycle, with amounts to be refunded from Tier 2 payments as they accumulate.' As noted earlier in this Workshop 4, Part 2 Report, all Tier 2 payments must be deposited into a state-designated fund. We therefore require Qwest to absorb the cost of the first two-year cycle as the entire funding mechanism."⁵⁰

Qwest argues as follows:

"there is nothing in ORS 759.445(1) that requires that *all* moneys required to be paid under a performance assurance plan must be deposited in the Connecting Oregon communities Fund. ORS 759.445(1) merely enables the Connecting Oregon Communities Fund to be able to receive such money; it does not mandate the amounts to be deposited. Rather it is the performance assurance plan itself, approved by the Commission, that determines

⁵⁰ Workshop 4, Part 2, Report, p. 89.

what amounts will be so deposited. Thus, the Commission is not legally constrained from adopting the multistate Facilitator's recommendation on this issue."⁵¹

Qwest cites no case or legislative history to support its interpretation and no comments on this subject were submitted by any CLECs.

We have independently looked into this question and note that the legislative history of SB 622 relating to this section, while slender, includes entry 240 of the July 13, 1999 Joint Committee Work Session Notes, in which Mr. Dick Yates of Legislative Revenue "[e]xplains the direction of money is to go into projects, like fibreoptics, and money to Connecting Oregon Communities Fund, does not go to the utilities." We thus conclude that it was not the legislature's intention that such funds would only be deposited at the Commission's discretion. Our original ruling on this issue is affirmed.

III. Public Interest and Secret Qwest Contracts

On June 28, 2002, AT&T filed comments relating to the Public Interest standard.⁵² In its Introduction, AT&T first asserts as a factual matter that competition has not increased in the months since it filed its original public interest brief. This, AT&T says, is due, in large part to the manner in which Qwest's wields market power.⁵³ AT&T uses the lack of robust competition on market share and wholesale margins as a basis for not recommending Section 271 approval; we previously rejected that argument.⁵⁴

AT&T next raises the issue of recent revelations that Qwest entered into "secret deals" which undermined the 271 process. The agreements were allegedly uncovered by the Minnesota Department of Commerce, who then filed a complaint against Qwest before the Minnesota Public Utilities Commission, which has yet to be adjudicated. AT&T further asserts that the Minnesota Commission has held that Qwest engaged in bad faith and a pattern of anticompetitive conduct in connection with UNE-P testing.⁵⁵

AT&T also notes the Petition to Intervene filed in this proceeding by Touch America. The ALJ denied the Petition and associated Motion on June 13, 2002, because he concluded that it would unreasonably broaden the issues and delay the proceedings. AT&T contends that the proceedings should have been broadened in light of the new and newly-discovered improper conduct of Qwest in a variety of areas. "For

⁵¹ Qwest Opening Filing, p. 21. (Emphasis in text).

⁵² Comments of AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on Behalf of TCG Oregon Regarding Public Interest (AT&T Public Interest Comments).

⁵³ *Id.*, p. 2.

⁵⁴ Workshop 4, Part 2, Report, pp. 44-45.

⁵⁵ AT&T Public Interest Comments, p. 3, 17-20.

the Commission to turn a blind eye to such conduct and reward Qwest with a positive recommendation on its Section 271 application would clearly be contrary to the public interest."⁵⁶

AT&T further contends that a consideration of these agreements should be consolidated with the 271 proceeding and notes the gravity with which several commissioners in other jurisdictions have responded to the allegations from Eschelon Telecom, Inc., one of the companies that entered into such agreements.⁵⁷

We noted in our Workshop 4, Part 2, Report that earlier allegations of Qwest misconduct did not, in our view rise to the standard required:

"[W]e do not believe that the totality of the earlier behavior is sufficient to warrant a finding of special circumstances that cannot be overcome either by the resolution of disputed matters in prior workshops or an effective Performance Assurance Program."⁵⁸

The question, therefore, is whether these revelations are of such a magnitude as to cause us to halt the completion of this docket pending the examination of the new allegations.

First, we note that the allegations are not Oregon-specific, but relate to agreements that are either region-wide or solely in other jurisdictions. Thus, Oregon lacks a unique perspective or interest in the analysis and conclusions that could be drawn from such an inquiry. Second, other jurisdictions in the Qwest region have chosen not to delay conclusion of the 271 proceeding.⁵⁹ Finally, we note that the United States Department of Justice has recently recommended that the FCC grant Qwest 271 authority, despite the proffered information.⁶⁰ In light of the combination of these three factors, we decline to reopen the record in this proceeding to consider the evidence of Qwest improprieties, but reserve the right to examine them at a later date.

⁵⁶ *Id.*, p. 4.

⁵⁷ Reply Comments of AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on Behalf of TCG Oregon on Workshop V.

⁵⁸ Workshop 4, Part 2 Report, p. 47.

⁵⁹ The WUTC concluded "We do not believe that investigations into such practices, however, are a proper basis for delaying or suspending this state's evaluation of Qwest's application to the FCC."

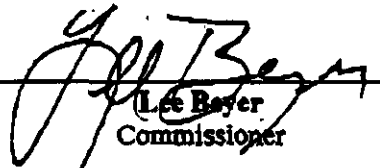
⁶⁰ *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region InterLATA Services in the States of Colorado, Idaho, Iowa, Nebraska, and North Dakota.* WC Docket No. 02-148, July 23, 2002.

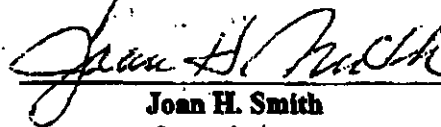
CONCLUSION

Qwest has obtained our affirmative recommendation to the Federal Communications Commission for its application to provide in-region interLATA services.

Dated AUG 19 2002


Roy Hemmingway
Chairman


Lee Bayer
Commissioner


Joan H. Smith
Commissioner